# Case Comments

## *Belknap, Inc. v. Hale*—Problems with Preemption and the Rights of Economic Strikers

### I. Introduction

It has been a well-settled principle in American labor law that an employer faced with an economic strike by its employees[1] may hire permanent replacement workers to carry on its business.[2] In *Belknap, Inc. v. Hale*[3] the United States Supreme Court held that replacement workers hired to fill the positions of economic strikers[4] may bring breach of contract and misrepresentation actions in state court, if the replacements were promised permanent employment but then ultimately were discharged as a result of a settlement agreement between the employer and the strikers that called for reinstatement of the striking employees.[5] In so holding, the *Belknap* Court overlooked the adverse effects the decision will have on the American labor policy of promoting peaceful settlement of labor disputes. This Comment examines how *Belknap* (1) casts further confusion on the vitality of a coherent body of preemption case law and (2) upsets the congressionally determined balance of power between employees and employers. In addition, this Comment proposes a solution to the problems created by *Belknap*.

### II. The Preemption Doctrine

Under the Supremacy Clause of the United States Constitution, federal legislation supersedes state law. The Supremacy Clause provides that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[6] In 1935 Congress passed the National Labor Relations Act (NLRA),[7] which provides a comprehensive federal scheme governing labor-management relations. In 1937 the United States Supreme Court upheld the constitutionality of the NLRA in *NLRB v. Jones & Laughlin Steel Corp.*[8] The *Jones & Laughlin* Court recognized that the purpose of the NLRA is to promote collective bargaining between employers and employee-chosen representatives, so that through collective negotiation private agreements ordering industrial relations can be established,

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1. An economic strike is one that is neither caused nor prolonged by an unfair labor practice on the part of the employer. 2 C. Morris, The Developing Labor Law 1007 (2d ed. 1983).

2. *See* NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938); *accord* NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967); American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965).

3. 463 U.S. 491 (1983).

4. Employees who engage in a work stoppage for reasons other than to protest an employer's commission of an unfair labor practice are considered economic strikers. R. Gorman, Basic Text on Labor Law, Unionization, and Collective Bargaining 339 (1976).

5. Belknap, Inc. v. Hale, 103 S. Ct. 3172, 3182 (1983).

6. U.S. Const. art. VI, cl. 2.

7. 29 U.S.C. §§ 151–169 (1982).

8. 301 U.S. 1 (1937).

thereby minimizing industrial strife.[9] Later, in 1945 the Court held in *Hill v. Florida*[10] that states can not enact regulations which burden the exercise of rights guaranteed to employees by the NLRA.[11] As a result, federal law preempts state law that conflicts with the federal labor legislation.

While inconsistent state labor laws must yield to the federal comprehensive scheme evidenced by the NLRA, state and federal courts have varied in their interpretation of which state laws are inconsistent with the NLRA.[12] Courts have disagreed on when state law can operate in connection with a labor-management controversy. As a result, the Supreme Court has gradually developed a "preemption doctrine." The doctrine has had a chaotic history and has caused much confusion. Despite the morass of case law, however, there has been some consistency in the Court's preemption decisions.

The United States Supreme Court applies two different theories under the preemption doctrine. The first theory has been labeled the primary jurisdiction rationale.[13] The Court relies on the primary jurisdiction rationale in preemption decisions that involve an actual or potential conflict between state tribunals and the National Labor Relations Board (NLRB), the agency given authority to enforce and administer provisions in the NLRA.[14] The second theory is the substantive rights rationale.[15] This theory is used in cases when state and federal substantive law either actually or potentially conflict. Although the Court continues to recognize each rationale as a distinct theory,[16] in many cases it has applied the two rationales to supplement each other. The Court's overlapping discussion of both theories by the Court is probably responsible for the existence of the many questions concerning the

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9. *Id.* at 45; *see also* Local 24, Teamsters v. Oliver, 358 U.S. 283, 295 (1959).

10. 325 U.S. 538 (1945).

11. *Id.* at 543.

12. See Garner v. Teamsters Local Union No. 776, 346 U.S. 485 (1953), in which the Court recognized that federal labor law "leaves much to the states, though Congress has refrained from telling us how much." *Id.* at 488. The Court recognized again that "Congress withdrew from the States much that had theretofore rested with them" in enacting the NLRA, and "what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation." International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958).

13. The Court referred to this preemption rationale as the "primary jurisdiction of the NLRB" in San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959). The label "primary jurisdiction" appears to have been adopted in Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of* Garmon, 72 COLUM. L. REV. 469, 472 (1972). The coined phrase has gained widespread acceptance and use by courts and commentators.

14. 29 U.S.C. § 153 (1982).

15. The phrase "substantive rights" comes from A. COX, D. BOK & R. GORMAN, CASES AND MATERIALS ON LABOR LAW 917 (9th ed. 1981). In R. GORMAN, *supra* note 4, at 768, this theory is referred to as the "substantive" rationale. This second area of preemption has also been referred to as laissez-faire preemption, when conduct which Congress intended to be free from governmental control is involved. *See* Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 219 n.4 (1978) (Brennan, J., dissenting); *see also* Brody, *Labor Preemption Again—After the Searing of* Garmon, 13 SW. U.L. Rev. 201, 205 (1982); Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1352 (1972). The phrase negative inference has also been used to describe this area of preemption, when the conduct is to be free from governmental control. *See* Lesnick, *supra* note 13, at 478. For the purpose of this Comment the substantive rights rationale is used to describe the second area of preemption, to clarify its emphasis on the conflict between state and federal law. The substantive rights rationale includes the laissez-faire area—conduct that is to remain free from any regulation. This is distinct from the primary jurisdiction rationale's emphasis on the conflict between state and federal tribunals and procedures; the two rationales, however, overlap considerably.

16. *See, e.g.*, Belknap, Inc. v. Hale, 463 U.S. 491 (1983); New York Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519, 528 n.12 (1979); Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978); Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976).

preemption doctrine. The doctrine becomes easier to understand, however, when the different situations in which the preemption doctrine may be applied are examined.

A court will be confronted with one of three possible situations when the controversy before it presents the preemption issue. First, state law may regulate, in parallel with federal law, conduct governed by the NLRA. Although there may be no conflict between the substantive state and federal laws, the danger of a conflict between the state and federal regulatory bodies is still present. In this case, a pristine application of the primary jurisdiction rationale is appropriate.

Second, state law regulating certain conduct may in some degree conflict with federal substantive law set forth in the NLRA. Alternatively, the state law may conflict with federal labor policy. In this case, an examination of both the primary jurisdiction rationale and the substantive rights rationale is needed. The amount of discussion and weight to be given each rationale depends on the degree to which the substantive laws are in conflict. If the state law and the NLRA directly conflict, the substantive rationale should be considered more fully. If the conflict stems from the effect of a state law on federal labor law or federal labor policy and the real danger is the conflicting procedures of the NLRB and the state tribunal, the primary jurisdiction rationale should be given more consideration.

The third situation is when state law attempts to regulate conduct which is neither expressly protected nor prohibited by the NLRA, but the conduct is the type of activity which Congress intended to be unregulated by any authority and left to the free play of economic forces.[17] In this situation the state law is subject to preemption under the substantive rights rationale. It is possible, however, that the primary jurisdiction rationale should also be applied since a state tribunal that attempts to apply state law to conduct which was meant to be unregulated conflicts with the NLRB, which takes "action" by its inaction. Thus, a danger in this case arises from conflicting procedures of state and federal agencies.

Preemption cases inevitably fit into one of the above categories and should be treated accordingly. The history and trend of the preemption doctrine and its rationales are examined below.

### A. *The Primary Jurisdiction Rationale*

Prior to 1959 the Supreme Court had not pronounced any dogmatic preemption rules. As a result, courts formulated a variety of preemption analyses, providing little, if any, predictability in the results of preemption cases. For example, some courts applied general common law, as opposed to state rules specifically designed to regulate labor relations.[18] Other courts attempted to scrutinize the NLRA to determine whether state courts had, in fact, arrived at conclusions inconsistent with the NLRA,[19] and often allowed states to provide remedies supplemental to the relief granted by the

17. *See* Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 140 (1976); NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971).

18. *See, e.g.*, UAW v. Russell, 356 U.S. 634 (1958).

19. *See, e.g.*, UAW v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949).

NLRA.[20] The courts espoused various rationales for finding or not finding a state law preempted in each case in which the issue was presented. By approaching the application of preemption on an ad hoc basis, important federal interests in the uniformity of federal labor law and the use of a centrally administered expert agency to apply the federal law were sacrificed, and a doctrine which would produce predictability in results and which could easily be applied by the lower courts was not formulated.[21]

Finally, in 1959 the United State Supreme Court formulated in *San Diego Building Trades Council v. Garmon*[22] a broad rule to be used in labor preemption cases. If the regulated activities are actually or arguably protected by section 7 of the NLRA,[23] or are actually or arguably prohibited by section 8 of the NLRA,[24] a state or federal court must decline to assert jurisdiction over the controversy; the cause must be left to the exclusive jurisdiction of the NLRB.[25] However, the Court declared two exceptions to this general rule.[26] Justice Harlan concurred in the result reached in *Garmon*, but found it necessary to emphasize that the question in preemption cases is whether the *conduct* is federally protected or prohibited.[27] He believed that the states could regulate conduct which is neither protected nor prohibited by the NLRA. Justice Harlan was particularly concerned that states would be unable to furnish an effective remedy for redressing nonviolent tortious conduct.[28]

The *Garmon* Court recognized that in enacting the NLRA, Congress had entrusted the administration of the Act to a centralized administrative agency, the NLRB, which is equipped with specialized knowledge and cumulative experience in the field of labor-management relations.[29] In addition, the NLRB has its own procedures to deal with labor problems. The paramount consideration in determining whether state law should be preempted is the danger, actual or potential, of conflict

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20. *See, e.g.*, Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955).

21. *See* Amalgamated Ass'n of St., Elec., Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 288–91 (1971).

22. 359 U.S. 236 (1959).

23. National Labor Relations Act § 7, 29 U.S.C. § 157 (1982), provides that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

24. National Labor Relations Act § 8(a), 29 U.S.C. § 158(a) (1982), defines employer unfair labor practices. The most basic provision states that "[i]t shall be an unfair labor practice for an employer (1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 157 of this title." *Id.* § 158(a)(1).

National Labor Relations Act § 8(b), 29 U.S.C. § 158(b) (1982), defines conduct which constitutes unfair labor practices committed by labor organizations.

25. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959).

26. *See infra* text accompanying notes 87–91.

27. 359 U.S. 236, 250 (1959) (Harlan, J., concurring).

28. *Id.* at 253. The decision in *Garmon* was reached before the NLRA was amended in 1959 by § 14(c), now codified at 29 U.S.C. § 164(c)(2) (1982), which permits state courts to assume jurisdiction over labor disputes in which the Board declines to assert its jurisdiction. The Court previously had held that if the NLRB declined to exercise its jurisdiction, the states were not free to regulate activities they would otherwise be precluded from regulating. *See* Guss v. Utah Labor Relations Bd., 353 U.S. 1, 9 (1957).

29. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 242–43 (1959) (citing Garner v. Teamsters Local Union No. 776, 346 U.S. 485, 490–91 (1953)).

with the national labor policy and its goals of the uniform application of federal labor law, the peaceful settlement of labor disputes, and the encouragement of collective bargaining.[30]

While problems arose in the application of *Garmon* to certain types of cases involving state law,[31] the primary jurisdiction doctrine was widely accepted by the courts, and its vitality was reestablished in *Amalgamated Association of Street, Electric, Railway & Motor Coach Employees v. Lockridge*.[32] In holding that a state breach of contract action brought by an employee against the employee's union was preempted by the NLRA, the Court took the opportunity to expound on the policies underlying the NLRA and the necessity of maintaining the primary jurisdiction rationale in preemption cases. The Court confirmed that the principles of preemption are designed to avoid conflicting regulation by various official bodies which might have some authority over the subject matter.[33] Congress conferred on the NLRB the responsibility for applying and developing the federal labor laws. Granting concurrent state and federal jurisdiction defeats the goals of the NLRA in its effort to achieve a uniform national labor policy.[34] The Court emphasized, as it had indicated in *Garmon*, that the proper focus in preemption cases is on the conduct being regulated, not on the formal description of governing legal standards.[35]

The *Lockridge* Court noted the federal system's mandate that the preemption issue be governed by a rule capable of easy application in the lower courts. The Court rejected a case-by-case method of determining whether a state law conflicts in some manner with federal labor policy.[36] The primary jurisdiction rationale provides the courts with an easy to apply rule that achieves predictability of results. Thus, the rule promotes the development of a uniform national labor policy, a goal deemed essential by the NLRA.

Justice Douglas, Justice White, and Chief Justice Burger dissented from the majority opinion in *Lockridge*. While the dissenters agreed with the application of the primary jurisdiction doctrine in preemption cases, they did not believe that preemption should be applied to cases involving union-employee controversies. Justice Douglas felt that the NLRA does not undertake the regulation of disputes between an employee and his or her union, at least when the dispute does not relate to the employee's job. Therefore, Justice Douglas believed that state action is appropriate in cases presenting a union-employee controversy.[37]

Justice White, with whom Chief Justice Burger joined in a separate dissenting opinion, was concerned with the arguably protected branch of the *Garmon* doctrine. Justice White recognized that an employer faced with arguably protected union conduct can not secure an NLRB determination on the question of whether the union

30. *Id.* at 242.
31. *See infra* text accompanying notes 87–91.
32. 403 U.S. 274 (1971).
33. *Id.* at 284–86.
34. *Id.* at 286–88 *passim*.
35. *Id.* at 292.
36. *Id.* at 294.
37. *Id.* at 308 (Douglas, J., dissenting); *cf.* Vaca v. Sipes, 386 U.S. 171 (1967).

activity is actually protected by the NLRA; any state action against a union engaged in arguably protected conduct is preempted and no decision can be reached on whether the conduct is *actually* protected by the NLRA. The employer can obtain a decision only if an independent NLRA unfair labor practice is committed and a charge is filed with the Board. When an employer's state action alleging that union conduct violates state law is preempted, an employer faced with arguably protected conduct is without a forum to determine whether the arguably protected conduct is *actually* protected by the NLRA. Preempted actions in which arguably protected conduct is *not* actually protected present valid claims which are left remediless. Thus, White urged the rejection of the arguably protected branch of the primary jurisdiction rationale.[38]

*Lockridge* approved the existence of the *Garmon* primary jurisdiction rationale. However, the *Lockridge* Court also underscored the exceptions to the rationale. Following *Lockridge*, courts that wanted to find state laws not preempted by the NLRA could fit the laws into the *Garmon* exceptions. This began to threaten the primary jurisdiction rationale. In *Sears, Roebuck & Co. v. San Diego County District of Carpenters*[39] the Court again established the rationale's validity, but narrowed its application.

In *Sears* the Court cited and applied *Garmon* with approval. However, the *Sears* decision significantly expanded the exceptions to the *Garmon* rule, thereby narrowing the scope of the primary jurisdiction rationale. The union in *Sears* complained that the employer, in violation of the collective bargaining agreement between the employer and the union, had hired nonunion employees to work on a construction site. The union established a picket line on Sears' property to protest the alleged violation of the agreement. Sears commenced a state court trespass action against the union and sought to enjoin the picketing.[40]

The *Sears* majority stated that the union activity was *both* arguably protected and arguably prohibited by the NLRA.[41] Under the arguably prohibited branch of *Garmon*, however, the *Sears* majority reasoned that preemption was unnecessary since the controversy presented to the state court was not identical to the controversy which could have been presented to the NLRB.[42] The Court held that the critical inquiry in arguably prohibited cases is whether the state court controversy is identical to the controversy which could be presented to the NLRB; if the two cases are not identical, the state action is not preempted by the arguably prohibited branch of *Garmon*.[43] Writing for the *Sears* majority, Justice Stevens argued that since in *Sears*

38. Amalgamated Ass'n of St., Elec., Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 309–19 (White, J., dissenting). White had expressed this view earlier in Longshoremen v. Ariadne Co., 397 U.S. 195 (1970), and would have held in *Ariadne* that when "employers are effectively denied determinations by the NLRB as to whether 'arguably protected' picketing is actually protected . . . only labor activity determined to be actually, rather than arguably, protected under federal law should be immune from state judicial control." *Id.* at 202 (White, J., concurring). Similarly, in Taggart v. Weinacker's, Inc., 397 U.S. 223 (1970), Chief Justice Burger expressed concern for the "hiatus" created in arguably protected cases when the NLRB does not assert jurisdiction and the state court action is preempted. *Id.* at 227 (Burger, C.J., concurring).

39. 436 U.S. 180 (1978).

40. *Id.* at 182–83.

41. *Id.* at 187.

42. *Id.* at 198.

43. *Id.* at 197.

the NLRB would have inquired into the *nature* of the picketing, while in the trespass action the state court inquired into the *location* of the picketing, the controversies were not identical, and therefore the state court action did not need to be preempted.[44]

Stevens also reasoned that the arguably protected branch of *Garmon* did not preempt the trespass action. He adopted the argument raised by Justice White in his *Lockridge* dissent[45] and indicated that only through the union's filing of an independent unfair labor practice could the controversy have been brought before the NLRB.[46] A party like Sears, faced with arguably protected conduct, would have no independent access to a Board determination on whether the conduct was actually protected; a state court action which governs arguably protected conduct was to be preempted, and the party faced with arguably protected conduct had no complaint under the NLRA to file with the Board. Justice Stevens thought the denial of NLRB review justified a finding that the state trespass action should not be preempted.

Justice Brennan wrote a vigorous dissent in *Sears*. He believed that the majority opinion undermined the primary jurisdiction rationale. Application of the *Sears* modified rule would be applied inconsistently by lower courts and would disserve the interests protected by the NLRA.[47] Brennan argued that the altered *Garmon* formulation would allow state court judgments to interfere with the interests of employers, employees, and the public, interests that are of central concern to national labor policy. He emphasized that preemption is necessary to promote uniformity in the application of national labor policy, and that the Board, drawing on its expertise in labor matters, is the appropriate agency to assess the strength of section 7 rights and section 8 violations.[48]

As a result of the *Garmon-Lockridge-Sears* trilogy, the primary jurisdiction rationale remains applicable in preemption cases. Courts generally agree that state laws which purport to regulate activities actually protected by section 7 of the NLRA or actually prohibited by section 8 of the NLRA must be preempted. Courts also do not dispute that state laws which regulate activites not protected and not prohibited by the NLRA, and not intended to be left unregulated, are not to be preempted. The problems in applying the primary jurisdiction rationale in preemption cases involve state laws which regulate activities arguably protected or arguably prohibited by the NLRA. While *Garmon* and *Lockridge* require preemption of state laws when the initial inquiry reveals that the conduct is arguably protected or arguably prohibited by the NLRA, *Sears* altered this approach. The *Sears* Court observed problems with the "arguably" branches of *Garmon*, and the Court appears to be striving to give state courts increased power in labor-management controversies.

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44. *Id.* at 198.

45. *See supra* note 38 and accompanying text.

46. Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 201–03 (1978). The *Sears* Court ignored that the conduct involved was *also* arguably prohibited, and the employer could have sought NLRB jurisdiction by filing an unfair labor practice complaint. The Court must have been concerned with cases in which the conduct was only arguably protected and must have been anxious to modify the arguably protected test.

47. *Id.* at 224 (Brennan, J., dissenting).

48. *Id.* at 235.

The *Sears* Court correctly recognized that some activities, while *arguably* protected, are not *actually* protected by the NLRA. Thus, some parties who could otherwise maintain valid state actions against wrongdoers will be left without redress because their actions involving arguably protected activity are preempted. A complaining party will be ousted from state court under *Garmon* if the defendant claims his or her actions are arguably protected by the NLRA. In addition, the complainant cannot gain access to NLRB jurisdiction to determine whether the activity is in fact actually protected, unless the complaining party can also file, for independent reasons, an unfair labor practice charge against the party who alleges its conduct is arguably protected by the NLRA. This leaves the complainant without a forum to have the dispute settled.[49] This is a valid concern, but in weighing the importance of a uniform federal labor policy against the possibility that some parties will be denied relief even though they might possess valid state claims, the rights of the individual must yield.[50] An easily applicable preemption doctrine must be fashioned to ensure that states defer to the exclusive jurisdiction of the NLRB in matters involving the delicate balance of employee, employer, and community interests. Some individual claims must be without redress in order to maintain an easy to apply preemption rule that produces predictable outcomes and results in a uniform national labor policy.[51]

*Sears* also limited the arguably prohibited branch of *Garmon*. Problems arise when a state action is brought against a defendant who asserts as an affirmative defense that the conduct is arguably prohibited by the NLRA, and that the state action must therefore yield to federal law. The defendant then is defending a state claim on the ground that he or she violated federal law.[52] Arguably, this presents an insidious situation. However, a party with a claim against an alleged wrongdoer who engaged in arguably prohibited conduct could file a complaint with the NLRB. If the NLRB declined to exercise its jurisdiction, the complaining party in many cases could then take the action to state court as provided by section 14(c) of the NLRA.[53] Regardless of the propriety of the state action, the complainant received an NLRB determination.

Under *Sears*, if an activity is arguably prohibited by the NLRA a state law regulating the activity will not be preempted by the arguably prohibited branch of *Garmon* if the controversy presented to the state court is different from the contro-

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49. *See supra* note 38.

50. See Come, *Federal Preemption of Labor-Management Relations: Current Problems in the Application of* Garmon, 56 VA. L. REV. 1435 (1970), in which the author recognizes that the "arguably protected" test leaves employers' interests in an unsatisfactory condition and results in a "no man's land" where adjudication of whether the activity is actually protected is forbidden. Come asserts, however, that modification of the arguably protected branch of *Garmon* would substantially impair the objective of a uniform national labor policy. *Id.* at 1452; see also Taggart v. Weinacker's, Inc., 397 U.S. 223, 230 (1970) (Harlan, J., mem. op.), in which Harlan argues that even if wrongs may occasionally go unredressed, regulation of arguably protected conduct must be preempted to ensure uniformity in federal labor law; Brody, *supra* note 15; *cf.* Cox, *Recent Developments in Federal Labor Law Preemption*, 41 OHIO ST. L.J. 277, 288–91 (1980).

51. Cox, *supra* note 50, at 291.

52. *See* Brody, *supra* note 15, at 207 (author asserts that this defense "violates basic notions of justice and common sense"); Lesnick, *supra* note 13, at 474 (absurd if union-defendant's defense is that it violated federal law and the employer-plaintiff rebuts this by asserting that the union's conduct was proper under federal law). *But see In re* Sewell, 690 F.2d 403, 409 (4th Cir. 1982) (defense that conduct is actually prohibited by the NLRA justified preemption).

53. *See supra* note 28. However, there are exceptions to § 14(c) and the Court had held that some cases are not subject to state jurisdiction even when the NLRB declines to assert its own jurisdiction.

versy that could be presented to the NLRB.[54] The Court thus developed a new "critical inquiry" test for arguably prohibited conduct. The *Sears* majority, in an attempt to preserve state jurisdiction over the controversy, strained the interpretation of the activity being regulated. The conduct in *Sears* was union picketing. This activity was arguably prohibited by the NLRA since the picketing might have been in violation of the union-employer collective bargaining agreement. Under *Garmon* and *Lockridge*, therefore, the state trespass laws that attempted to regulate the picketing should have been preempted. The *Sears* Court, however, distinguished the conduct being regulated by the state, the location of the picketing, from the nature of the activity.[55] In so doing, the Court implicitly defined the conduct by the legal standard of trespassing, thereby ignoring the mandate of *Garmon* and *Lockridge* that the proper focus in preemption cases is on the *conduct* being regulated, not on a description of the legal standards.[56] By departing from a focus on conduct itself, it is difficult to imagine a case in which a court could not distinguish an action brought before a state tribunal from an action brought before the NLRB. States are now free to contort a state action into one which may be found not preempted by the NLRA. Allowing states to exercise greater power over labor disputes sacrifices uniformity in national labor policy and severely lessens the predictability of results in cases which present the preemption issue.

It remains unclear how the state courts will react to and apply the "arguably" standards formulated in *Sears*. As evidence of confusion that might develop, the Ninth Circuit recently applied the rationale of the arguably *prohibited* critical inquiry test—that if the controversy before the Board and the courts could not fairly be called identical, preemption should not follow—to conduct which was arguably *protected* by the NLRA.[57] In addition, the Supreme Court has recently added to the morass of preemption decisions by apparently changing the focus of its inquiry in preemption cases.

In *Local 926, International Union of Operating Engineers v. Jones*[58] the Court recognized the distinction it formulated in *Sears*, but emphasized that the proper focus of concern in preemption cases is on the conduct being regulated. The *Jones* Court held that an action brought by a low level supervisor against his or her union for tortious interference with contract and conspiracy is preempted by federal law even though the contract claim could be distinguished from a complaint brought before the NLRB.[59] Justice Rehnquist, writing for the three dissenters in *Jones*, accused the *Jones* majority of overlooking the *Sears*-modified *Garmon* rule in cases involving arguably prohibited conduct. He believed that the state action was different from the action that could have been brought before the NLRB, since proof of coercion was

54. Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 197 (1978).

55. *Id.* at 198.

56. Amalgamated Ass'n of St., Elec., Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 292 (1971); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 250 (1959) (Harlan, J., concurring).

57. Waggoner v. McGray, 607 F.2d 1229 (9th Cir. 1979); *see also* United Credit Bureau of Am., Inc. v. NLRB, 643 F.2d 1017, 1025 (4th Cir.), *cert. denied*, 454 U.S. 994 (1981).

58. 460 U.S. 669 (1983).

59. *Id.* at 684.

not required in the state action.[60] He believed that the *Jones* majority had not applied *Sears*, and emphasized that preemption is *not* dictated merely because a state claim is based on arguably prohibited conduct.[61] *Jones* further confuses the preemption doctrine. The Court needs to formulate a rule which is easier to apply and which yields greater predictability in the outcome of litigation.

B. *Substantive Rights Rationale*

In addition to the primary jurisdiction rationale, the Court applies a second theory in support of the preemption doctrine—the substantive rights rationale. In *United Automobile Workers v. Wisconsin Employment Relations Board (Briggs-Stratton)*[62] the Court held that an activity neither protected nor prohibited by the NLRA can be governed by state law.[63] However, the Court soon realized that Congress intended to leave some activities entirely unregulated by any federal or state authority.[64] Although the NLRA's purpose is to promote collective bargaining and reduce industrial strife, the federal labor law scheme also recognizes that economic pressure is a vital part of the bargaining process. Thus, economic weapons should be available to both employers and employees if peaceful negotiations fail.

The Court recognized that allowing a state to regulate conduct which Congress intended to leave completely unregulated would obstruct federal labor policy to the same extent as allowing a state to regulate conduct expressly protected by the NLRA.[65]

The Court stated in *NLRB v. Insurance Agents' International Union*[66] that the overall goal of the NLRA is the achievement of industrial peace. To foster this objective, Congress imposed a duty on both the employer and the union to confer in good faith with a desire to reach an agreement. However, "[t]he presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the [NLRA has] recognized."[67] The majority in *Insurance Agents'* argued that if economic weapons were regulated, the regulating authority would be in a position to exercise great influence over the substantive terms of an agreement between the parties.[68] By affecting an economic weapon which Congress made available to a party involved in negotiations, a tribunal affects the bargaining leverage of the party who could otherwise exercise its economic clout. This situation, in turn, affects the terms of the ensuing agreement, since a party who can not threaten economic action will be forced to bargain with less vigor. To allow

60. *Id.* at 690 (Rehnquist, J., dissenting).
61. *Id.* at 685–86 n.2.
62. 351 U.S. 266 (1956).
63. *Id.*
64. *See* Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 140 (1976); NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971); *see also* Hanna Mining Co. v. Marine Eng'rs Beneficial Ass'n, 382 U.S. 181, 189 (1965); Local 20, Teamsters v. Morton, 377 U.S. 252, 259 (1964); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 240 (1959).
65. Garner v. Teamsters Local Union No. 776, 346 U.S. 485, 499–500 (1953).
66. 361 U.S. 477 (1960).
67. *Id.* at 489.
68. *Id.* at 490.

governmental interference with the substantive terms of a collective agreement violates federal labor policy.[69] Thus, neither state nor federal authorities should regulate economic weapons granted to combatants in a labor dispute.

While some conduct was to be left unregulated, the Court had to determine which activities Congress intended to be free from control. The standard used is whether Congress has occupied the field (by its silence in the NLRA) and thereby has closed it to state regulation. The answer depends upon whether the application of state law would frustrate the purpose of the federal legislation.[70]

In *Local 20, Teamsters v. Morton*[71] the Court held that a secondary boycott[72] is a form of self-help available to unions to help them achieve their bargaining goals during negotiations; although the NLRA neither prohibits nor protects secondary boycotts, state attempts to regulate them must be preempted. The boycott's use was part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer, and the community.[73]

In *American Ship Building Co. v. NLRB*[74] the Court held that resort to economic weapons is a right of employers as well as employees, and that an employer is permitted to use a temporary layoff as an economic weapon in support of its bargaining position.[75] Employers, to counterbalance the employees' power to strike, have the right to hire permanent replacements to carry on the employer's business.[76]

The Court examined its past preemption decisions that involved conduct which Congress intended to be free from regulation and formulated, in *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*,[77] a preemption rule for conduct that is to be left entirely free for the operation of economic forces. The *Machinists* Court reaffirmed its position that an activity might be protected by federal law not only when it is expressly mentioned in section 7, but also when congressional silence indicates that the activity is to be unrestricted by any governmental power, federal or state.[78] One commentator suggests that this type of conduct be called "permitted activity."[79] Through the regulation of permitted activities that can be used as part of the collective bargaining process, states can exert considerable influence on the substantive terms of the parties' agreement.[80] This result is contrary to federal policy, which mandates that substantive terms of labor agreements be free from governmental intervention. The *Machinists* Court expressly

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69. *Id.* (citing S. REP. No. 105, 80th Cong., 1st Sess. 2 (1949)).

70. Local 20, Teamsters v. Morton, 377 U.S. 252, 258 (1964); *see also* Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 380 (1969).

71. 377 U.S. 252 (1964).

72. A secondary boycott occurs when a union applies economic pressure to a person, with whom the union does not have a dispute regarding its own terms of employment, in order to induce that person to cease doing business with another employer with whom the union does have a dispute. R. GORMAN, *supra* note 4, at 240.

73. Local 20, Teamsters v. Morton, 377 U.S. 252, 259 (1964).

74. 380 U.S. 300 (1965).

75. *Id.* at 317.

76. *Id.* at 325.

77. 427 U.S. 132 (1976).

78. *Id.* at 141.

79. Cox, *supra* note 15, at 1346.

80. *See supra* text accompanying notes 68–69.

overruled *Briggs-Stratton*, which had taken a contrary approach.[81] Therefore, state attempts to regulate conduct intended by Congress to be left unregulated by any authority must be federally preempted. Permitted activities are to be free from state regulation, and state law purporting to regulate permitted activities must be preempted.

In *New York Telephone Co. v. New York State Department of Labor*[82] a plurality of the Court held that national labor policy does not prohibit the payment of state unemployment compensation to striking employees.[83] The three concurring justices joined the three dissenting justices and argued that in determining whether a state should be allowed to regulate conduct which is unmentioned in the NLRA, an intent to preempt state law should be presumed if the state law affects the balance of power between labor and management, unless it fits into one of two possible exceptions. Exceptions should be made for conduct either evidencing a merely peripheral concern of the NLRA or involving deeply rooted local feelings.[84] This presumption, however, was not adopted by the majority opinion, even though six of the nine Justices were in agreement. It has been suggested that state laws of "general applicability"[85] be allowed to operate, unless the operation of state law interferes with a specific federal right,[86] since it is unlikely that these general state laws will upset the balance of interests set up by Congress in the NLRA.

### C. *Exceptions to the Preemption Doctrine*

The *Garmon* Court recognized two exceptions to the primary jurisdiction rationale. The first exception is when the activity regulated is a peripheral concern of the NLRA. The second exception is for regulated conduct which touches interests "so deeply rooted in local feeling and responsibility that in the absence of compelling Congressional direction" one could not infer that Congress has deprived the state of power to act. In these two instances state power to regulate the activity is not to be withdrawn.[87]

The Court has held violent activities or activities that imminently threaten violence to be permissible targets of state regulation.[88] Malicious defamation actions arising from conduct in labor disputes have been held to fall within the exceptions to preemption and thus, not preempted by federal law.[89] The Court has also held that

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81. Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 154 (1976).

82. 440 U.S. 519 (1979).

83. *Id.* at 527.

84. *Id.* at 549 (Blackmun, J., concurring); *id.* at 566 (Powell, J., dissenting). *See infra* text accompanying notes 87–91 for a discussion of the preemption exceptions.

85. Cox, *supra* note 15, at 1355–56; *see also* Cox, *supra* note 50; Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297 (1954).

86. Cox, *supra* note 15, at 1356.

87. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243–44 (1959).

88. UAW v. Russell, 356 U.S. 634 (1958); Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954).

89. Linn v. United Plant Guard Workers Local 114, 383 U.S. 53 (1966) (The Court applied the standard it had formulated in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and held that malice and actual damages must be

state actions brought by union members against their union for intentional infliction of emotional distress are not preempted by the NLRA.[90] In addition, *New York Telephone* makes it clear that the *Garmon* exceptions apply to cases involving permitted activities.[91]

### D. *Trend of the Preemption Doctrine*

The Court has moved from the application of a broad preemption rule formulated in *Garmon* to a more narrow and restrictive rule modified by *Sears* and by cases purporting to fit state laws into the *Garmon* exceptions. Preemption can be viewed on a continuum with the pre-*Garmon* decisions and case-by-case adjudications at one extreme and the *Garmon* primary jurisdiction and broad interpretation of the substantive rights rationale at the other extreme. The Court is moving away from a broad interpretation of the preemption doctrine and toward the pre-*Garmon* decisions allowing greater state regulation of labor controversies. Preemption is being thrust into a zone of uncertainty. In its desire to allow greater state regulation, the Court must not sacrifice federal interests in the uniform application of national labor laws and the reduction of labor strife through the process of collective negotiation and the necessary use of economic weapons by feuding parties. The social benefits derived from the observation of these interests are greater than the benefits received from short-run victories to state court plaintiffs. These interests were deemed vital by the Congress that enacted the NLRA.

## III. Hiring Permanent Replacements for Striking Employees

Congress intentionally made available to employers the ability to hire workers to replace employees engaged in an economic strike.[92] An employer's right to hire permanent replacements for workers who have elected to strike for economic reasons counterbalances the employees' economic power in the right to strike.[93] The economic strikers retain their employee status, as defined in section 2 of the NLRA, unless the employee has obtained regular and substantially equivalent employment.[94]

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pleaded and proved to support a state action sufficient to survive the preemption test.); *cf.* Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974) (The Court applied the *Linn* standards but found the action preempted since there was no evidence of malice.).

90. Farmer v. United Bhd. of Carpenters Local 25, 430 U.S. 290 (1977); *cf.* Viestenz v. Fleming Cos., 681 F.2d 699, 704 (10th Cir. 1982), in which the Court cited *Farmer* with approval but held the action preempted, finding that the conduct was not outrageous enough to warrant state regulation, and that preemption was proper since the claim arose out of the discharge itself; *see also* Magnuson v. Burlington N., Inc., 576 F.2d 1367, 1369 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978) (In holding state action for conspiracy preempted, the Court recognized that "[a]rtful pleading cannot conceal the reality that the gravamen of the complaint is wrongful discharge.").

91. 440 U.S. 519, 540 (1979).

92. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938); *accord* NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 379 (1967); American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965); Amalgamated Meat Cutters, Local Union No. 576 v. Wetterau Foods, Inc., 597 F.2d 133 (8th Cir. 1979); Johns-Manville Prods. Corp. v. NLRB, 557 F.2d 1126 (5th Cir. 1977), *cert. denied*, Oil, Chem., and Atomic Workers Int'l Union, AFL-CIO v. Johns-Manville Prods. Corp., 436 U.S. 956 (1978).

93. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

94. National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (1982), defines employees as:

The employer's power and counter-pressure results because the employer is not obligated to reinstate the economic strikers upon their unconditional offer to return to work if the employer can show "legitimate and substantial business justifications"[95] for refusing reinstatement. When workers hired as permanent replacements during the strike occupy jobs claimed by the economic strikers, the employer has a sufficient business justification to refuse reinstatement. In these circumstances, reinstatement refusal is not an unfair labor practice.[96]

If, however, employees strike to protest an unfair labor practice committed by the employer, the strike is deemed to be an unfair labor practice strike.[97] An economic strike can be converted into an unfair labor practice strike if the employer commits an unfair labor practice after the commencement of the strike.[98] Employees engaged in an unfair labor practice strike do not lose their status as employees and, in contrast to economic strikers, are entitled to reinstatement with back pay if they offer to return to work, even if permanent replacements for them have been hired.[99]

## IV. HOLDING AND ANALYSIS OF *BELKNAP, INC. V. HALE*

### A. *Facts of* Belknap

The facts in *Belknap, Inc. v. Hale*[100] are typical of many cases in which employees strike to place economic pressure on their employers after a bargaining impasse has been reached. In *Belknap*, the company-union collective bargaining agreement expired on January 31, 1978. The parties opened negotiations before the contract term ended and bargained to an impasse. On February 1, 1978, 400 of Belknap's employees went on strike.[101]

Belknap granted a unilateral wage increase[102] to its nonstriking employees on the same day the strike commenced.[103] Belknap then sought to hire replacements for the striking employees and placed ads for "permanent employees" in a local newspaper. Each replacement worker signed a statement of understanding that he or she was hired

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any employee, and shall not be limited to the employees of a particular employer, unless [the Act] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. . . .

95. NLRB v. Great Dane Trailers, 388 U.S. 26 (1967); see *infra* note 157 for a discussion of business justification.

96. NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 379 (1967).

97. R. GORMAN, *supra* note 4, at 339; 2 C. MORRIS, *supra* note 1, at 1007.

98. For an explanation and discussion of the conversion doctrine, see generally Stewart, *Conversion of Strikes: Economic to Unfair Labor Practice: II*, 49 VA. L. REV. 1297 (1963); Stewart, *Conversion of Strikes: Economic to Unfair Labor Practice*, 45 VA. L. REV. 1322 (1959).

99. Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 278 (1956).

100. 463 U.S. (1983).

101. *Id.* at 3174.

102. A unilateral wage increase occurs when an employer uniformly raises the wages of all employees. It is arguably an unfair labor practice to grant a unilateral wage increase in the course of an economic strike. NLRB v. Katz, 369 U.S. 736 (1962) (Notice to strikers may be an issue. A unilateral wage increase without notice to the bargaining representative is a per se violation of § 8(a)(5).). *But see* Kohler Co., 128 N.L.R.B. 1062 (1960), in which a unilateral wage increase, offered to the union but in a different form, was held to violate the Act.

103. Belknap, Inc., v. Hale, 463 U.S. 491, 494 (1983).

as a regular full-time permanent employee.[104] Belknap also circulated memorandums to the replacements, assuring them of their permanent status. The memos declared that the employer did not intend to fire the replacements in order to provide jobs for the strikers if the strikers offered to return to work.[105]

Throughout this period, the striking union filed unfair labor practice charges with the NLRB, claiming that the unilateral wage increase granted by Belknap on the date the strike began was an unfair labor practice in violation of sections 8(a)(1), (3), and (5) of the NLRA.[106] Belknap filed countercharges against the union with the NLRB, alleging union misconduct during the strike. At a settlement conference held before the NLRB hearing on the unfair labor practice charges, the regional director representing the NLRB agreed to withdraw all charges and complaints if Belknap and the striking union could reach an agreement. Belknap and the striking employees reached an agreement which included a provision for the reinstatement of at least thirty-five strikers per week.[107]

Belknap laid off its permanent replacements to provide positions for the returning strikers. The unemployed replacement workers filed actions in Kentucky state court, alleging breach of contract and misrepresentation by Belknap. The trial court granted Belknap's summary judgment motion and held that the NLRA preempted the state court actions.[108] The Kentucky Court of Appeals reversed the trial court decision. The intermediate court held that the contract and misrepresentation claims were only peripheral concerns of the NLRA and were deeply rooted in local feeling and responsibility; therefore, the court reasoned that under the *Garmon* exceptions the state actions were not preempted.[109] The Kentucky Supreme Court granted discretionary review, but vacated its order as having been improvidently granted.[110] The case came before the United States Supreme Court on petition for writ of certiorari.[111]

The United States Supreme Court affirmed the Kentucky Court of Appeals decision and found that the replacements who were promised permanent employment could maintain state actions against Belknap for breach of contract and misrepresentation. Although the Court recognized the existence of both the primary jurisdiction

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104. *Id.* at 495.

105. *Id.*

106. National Labor Relations Act §§ 8(a)(1), (3), and (5), 29 U.S.C. §§ 158(a)(1), (3), and (5) (1982) provide:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 [section 7] of this [Act] . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

(5) to refuse to bargain collectively with the representatives of his employees. . . ..

107. Belknap, Inc. v. Hale, 463 U.S. 491, 496 (1983). The union-employer strike settlement agreement is set forth in the Brief for Petitioner at 9, Belknap, Inc. v. Hale, 463 U.S. 491 (1983).

108. Hale v. Belknap, Inc., No. 78CI10337 (Jefferson Cy. Cir. Court, May 8, 1980) (order granting summary judgment). The trial court decision was unreported; *see* Joint Appendix to Petition for Writ of Certiorari at 9a, Belknap, Inc. v. Hale, 463 U.S. 491 (1983), for a copy of the order granting summary judgment.

109. Hale v. Belknap, Inc., No. 80-CA-1630-MR (Ky. Ct. App.)(reversing order for summary judgment); *see* Joint Appendix to Petition for Writ of Certiorari at 14a-18a, Belknap, Inc. v. 463 U.S. 491 (1983), for a copy of the intermediate court's order.

110. Belknap, Inc. v. Hale, 622 S.W.2d 918 (Ky. 1981) (discretionary review granted).

111. *Cert. granted,* Belknap, Inc. v. Hale, 457 U.S. 1131 (1982).

rationale and the substantive rights rationale in preemption cases, it held that the state court actions brought by the replacement workers in *Belknap* were not subject to preemption under either rationale.[112]

B. *Analysis Under the Substantive Rights Rationale*

The AFL-CIO and the NLRB, both as amicus curiae, and Belknap argued that if the replacement workers were permitted to bring breach of contract and misrepresentation actions in state court, the employer's economic weapon of hiring permanent replacements for striking employees would be destroyed.[113] Undermining the self-help weapon that Congress intended to grant to employers would upset the balance of economic power between employers and employees that Congress accomplished in the NLRA. Therefore, they argued, preemption would be justified. Justice White wrote the *Belknap* majority opinion and reasoned that Congress might have intended to allow a union and an employer to use their economic weapons against one another, but that federal law could not have intended the use of economic weapons to injure innocent third parties (the replacement workers). The Court majority held that when an employer hires replacements for striking employees, the employer must remain liable under state law to replacements promised permanent employment for breach of contract and misrepresentation.[114]

The majority supported its holding by arguing that the state actions would not interfere with the federal labor law policy that encourages the peaceful settlement of labor disputes. The majority suggested that employers could make conditional offers of permanent employment to replacement workers. The conditional offers would promise the replacements permanent employment, unless the employer were required to reinstate the striking employees because of a settlement between the employer and the striking union or a finding by the NLRB that the employer had committed an unfair labor practice.[115] The *Belknap* majority asserted that such a conditional offer of permanent employment would be sufficient to establish that economic strikers need not be reinstated upon their unconditional offer to return to work; thus, the employer's weapon of hiring permanent replacements would be preserved. In addition, a conditional offer would not impede settlement; if the union and employer decided to settle their controversy and agree to striker reinstatement, the employer would not be liable to the replacements who were given conditional offers of permanent employment.[116]

In his concurring opinion, Justice Blackmun criticized the majority's conditional offer suggestion. In his view, a conditional offer of permanent employment does not establish that the replacements have been hired for a legitimate and substantial

112. Belknap, Inc. v. Hale, 463 U.S. 491, 496–97 (1983).

113. *See* Brief for Petitioner at 19, Belknap, Inc. v. Hale, 463 U.S. 491 (1983); Brief for NLRB as amicus curiae at 4, Belknap, Inc. v. Hale, 463 U.S. 491 (1983); *but see* Brief for AFL-CIO as amicus curiae at 4–5, Belknap, Inc. v. Hale, 463 U.S. 491 (1983).

114. Belknap, Inc. v. Hale, 463 U.S. 491, 502 (1983).

115. *Id.* at 503.

116. *Id.* at 505. In fact, White urged that an employer was likely to settle and agree to reinstate strikers once freed from the threat of liability by making conditional offers. *Id.* at 505 n.9.

business justification.[117] Blackmun believed that the employer's right to hire replacements for striking employees stems from its need to continue business operations during a strike.[118] By conditioning a permanent offer of employment, an employer admits that the purpose of hiring the replacements is not to maintain business operations but rather to gain ammunition for bargaining with the union. In Blackmun's view, because the employer does not have legitimate and substantial business reasons for hiring conditional status replacements, the employer must reinstate economic strikers upon their unconditional offer to return to work.[119] Blackmun concurred with the majority, however, because he believed that since Congress intended employers to possess the power to hire replacement workers, state law must obligate the employers to the replacement workers so they can establish legitimate business reasons for hiring the replacements.[120]

Blackmun acquiesced in the Court's opinion that the state action would not frustrate the federal labor law policy favoring settlement of labor disputes, since the employer's decision to offer replacements *permanent* employment is a voluntary one. If the employer does not make a permanent offer, the employer will not be subject to liability under state law, and will then be willing to settle with the union.[121]

Justice Brennan, dissenting from the Court's opinion in *Belknap* and joined by Justices Marshall and Powell, argued that the union strike is one of the most powerful weapons available to pressure an employer into granting concessions. The counterweapon available to an employer faced with a strike is the ability to hire permanent replacements for the strikers. This threatens striking employees with the possibility that their jobs will be forfeited. Brennan saw a potential conflict between state law and federal law if the breach of contract and misrepresentation actions were not preempted. Brennan reasoned that if the strike were adjudicated an unfair labor practice strike, the employer would be required by federal law to reinstate the strikers, even though permanent replacements had been hired to fill the strikers' jobs.[122] Since in many cases it is unclear whether a strike is an unfair labor practice strike or an economic strike, reinstatement of strikers is arguably required by federal law; therefore, since the conduct is arguably required by federal law, breach of contract actions brought by replacements hired to fill strikers' positions must be preempted.[123] Brennan emphasized that the Court could not proceed to adjudicate on an ad hoc basis cases involving the preemption of breach of contract actions brought by discharged replacements. He believed that the Court should deal with classes of cases in preemption decisions.[124]

Brennan also argued that an employer faced with potential liability to permanent replacements likely would be unwilling to agree to a settlement with the striking

117. *Id.* at 514 (Blackmun, J., concurring).
118. *Id.* at 518; *see infra* note 157.
119. 463 U.S. 491, 519 (1983) (Blackmun, J., concurring).
120. *Id.* at 519.
121. *Id.* at 519.
122. *Id.* at 523 (Brennan, J., dissenting).
123. *Id.* at 530-31.
124. *Id.* at 530 n.2.

union. The employer would be encouraged to litigate the unfair labor practice rather than attempt to negotiate a settlement agreement with the union. The effect of impeding settlement frustrates the policy of the NLRA and interferes with the NLRB's administration of the Act.[125] Discouraging settlement and encouraging litigation of unfair labor practice complaints impedes the NLRB's administration of the NLRA. Therefore, Brannan felt that the breach of contract and misrepresentation actions should be preempted.

The *Belknap* majority, however, apparently decided at the outset that the replacement workers' breach of contract and misrepresentation actions should be allowed to proceed, and then tried to contort the state suits into an exception to the preemption doctrine. It seems facially unfair to bar lawsuits by replacement workers who were promised permanent employment and were later discharged because the employer and the striking union reached a settlement agreement. The Court appears to have considered this in referring to the replacements as "innocent third parties."[126] The Court was concerned with the rights of the replacements who were promised permanent employment but then were later discharged.

However, in *Hot Shoppes, Inc.*[127] the NLRB recognized the illusory nature of the "permanence" promised to replacement workers. The Board reasoned that the intentions of the employer and the employees are to be found in the extrinsic circumstances surrounding the establishment of the employment relationship with replacements and in the nature of the relationship itself.[128] A replacement who crosses a picket line must realize the circumstances surrounding his or her employment. Judge Learned Hand recognized that

> [i]t is of course true that the consequences are harsh to those who have taken the strikers' places; strikes are always harsh; . . . as between those who have used a lawful weapon and those whose protection will limit its use, the second must yield; and indeed, it is probably true today that most men taking jobs so made vacant, realize from the outset how tenuous is their hold.[129]

Thus, workers hired to replace strikers realize that they face the possibility of discharge if the strikers return to their original positions. In *Belknap*, the company informed the replacements that they were being hired to replace the economic strikers, and the replacements must have crossed picket lines to enter their work place each day. While knowledge by replacement workers of the surrounding labor dispute does not privilege an employer to make empty promises to the replacements, it does undercut the *Belknap* Court's concern for replacement workers as innocent third parties. This knowledge also supports an inference that the replacements implicitly agreed, in accepting employment, that Belknap retain the right to discharge the replacements if a settlement with the union required Belknap to reinstate the strikers.

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125. *Id.* at 3194. Of complaints issued by the NLRB, 82% are resolved by settlement agreements. Brief for NLRB as amicus curiae at 13, Belknap, Inc. v. Hale, 463 U.S. 491 (1983).

126. Belknap, Inc. v. Hale, 463 U.S. 491, 500 (1983).

127. 146 N.L.R.B. 802 (1964).

128. *Id.* at 832.

129. NLRB v. Remington Rand, Inc., 94 F.2d 862, 871 (2d Cir.), *cert. denied*, 304 U.S. 576 (1938).

Even though Belknap expressly told the replacements that they were being hired permanently, the meaning of "permanence" is inherently ambiguous, since most employment relationships are terminable at will.[130]

Employers have been given the right to hire permanent replacements for economic strikers to carry on their businesses, and an employer is not under any duty to reinstate the economic strikers in the event that they unconditionally offer to return to work, assuming the employer can demonstrate that it has hired permanent replacements to fill the jobs of the striking employees.[131] The employer has the burden of proving that the replacements were hired on a permanent basis.[132] If a court finds that replacements were not hired permanently, the employer's duty to reinstate economic strikers is not abrogated. Thus, the employer must be able to prove that it hired replacements on a permanent basis if it is to have an effective economic weapon against its striking employees.[133]

*Belknap* puts the employer in a "Catch-22" situation. The employer, exposed to liability to employees hired as permanent replacements for striking employees, is faced with two alternatives in the initial hiring of replacements. It may decide to hire replacements on a temporary basis, or it may decide to hire replacements on a permanent basis. If the employer hires temporary replacements, the employer loses possession of a powerful weapon to combat the strike and force settlement with the union. The striking employees are not faced with the possibility of forfeiting their jobs, since they must be reinstated by the employer upon their offer to return to work. If the employer hires permanent replacements, however, the Court in *Belknap* leaves the employer subject to state court misrepresentation and breach of contract lawsuits if the employer decides to discharge replacements and reinstate the strikers. Many strike settlement agreements provide for reinstatement of striking employees—it is one vital demand of the striking union in exchange for which the union grants concessions on other issues.[134] After *Belknap*, the employer has little, if any, motivation to offer the striking employees jobs when it has hired permanent replacements. If the strike is arguably an unfair labor practice strike, the employer is encouraged to litigate and defend the complaint rather than settle it. Settlement with potential liability to replacements is less desirable than defending the complaint and hoping that the strike will be adjudicated an economic strike. If the strike is adjudicated an economic strike, the employer would not be required to reinstate the strikers. If it is found to be an unfair labor practice strike, the employer must reinstate

130. The liability to the replacements may be questioned since in many cases, employment is terminable at the will of either the employee or the employer. This Comment shall not review the changes and aberrations in the employment at will doctrine. For an expose of current trends in the doctrine see Krisher, *The Growing Arsenal of Rights of Unrepresented Employees: Recent Trends in the Common-Law Employment At-Will Doctrine and Employee Privacy*, 1982 LAB. L. DEVELOPMENTS 245.

131. *See supra* text accompanying notes 92–99.

132. NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967); *accord* NLRB v. Mars Sales & Equip. Co., 626 F.2d 567, 572 (7th Cir. 1980); NLRB v. Murray Prods., Inc., 584 F.2d 934, 938 (9th Cir. 1978).

133. Brennan recognized that the need to establish the permanence of the replacements was probably the reason that the company in *Belknap* assured replacements that they were permanent. Belknap, Inc. v. Hale, 463 U.S. 491, 537 n.11 (1983) (Brennan, J., dissenting).

134. *See, e.g.*, Philip Carey Mfg. Co. v. NLRB, 331 F.2d 720, 728 (6th Cir.), *cert. denied*, 379 U.S. 888 (1964); Note, *Replacement of Workers During Strikes*, 75 YALE L.J. 630 (1966).

strikers, but the employer's liability to replacements is unclear. The effect of *Belknap* will be to discourage the settlement of labor disputes and to encourage litigation, thereby adversely affecting the administration of the NLRB.

The *Belknap* Court, in an effort to accommodate the interests of the replacement workers, ignored this adverse impact on labor policy. The Court attempted to remedy this problem by providing for a conditional permanent offer to replacement workers. The dissenters and Justice Blackmun, although for different reasons, properly recognized that a conditonal offer of permanent employment provides a deficient answer. The dissenting Justices worried that conditional offers would decrease the employer's ability to find replacement workers.[135] However, if replacements have always known "how tenuous their hold" is on their employment,[136] an employer who expressly informs the replacements that their status is conditional should not find its ability to find replacement workers diminished. The real problem is that employers will find permanent replacements for the strikers and refuse to reinstate the striking employees.[137]

It is also uncertain whether the Board will be willing to find that replacements offered employment conditionally are "permanent" replacements, so as to abrogate an employer's duty to reinstate economic strikers should they offer to return to work.[138] Without the ability to threaten the striking employees with no reinstatement, the employer's economic weapon of hiring permanent replacements is destroyed and employers are without any bargaining leverage in settlement negotiations with the striking union. It is not within the province of the Court to interfere with economic weapons which Congress intended to be free from governmental regulation.[139]

Justice Blackmun believes that conditional offers render the replacements nonpermanent. An employer that threatens during strike settlement negotiations to retain replacements hired conditionally violates the NLRA and commits an unfair labor practice, since an unjust refusal to reinstate strikers at the end of an economic strike may discourage the right to strike.[140] Therefore, a prudent employer would not assume the risk of hiring replacements on a conditional basis.

Under pre-*Belknap* law, before employers could refuse to reinstate economic strikers they were required to show that they had hired permanent replacements. Neither the NLRB nor any court had ever held that an employer is bound to retain permanent replacements because they had been offered permanent employment. This might make the meaning of an offer of "permanent" employment in the labor setting

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135. 463 U.S. 491, 538 (1983) (Brennan, J., dissenting).

136. *See supra* text accompanying note 129.

137. *See* Lopatka, *Recent High Court Case Clarifies Rights of Permanent Replacements*, Nat'l L.J., Aug. 8, 1983, at 19, col. 1; Rissetto & Dufek, *Terminated Strike Replacements Permitted to Sue*, Legal Times, Aug. 8, 1983, at 23, col. 1.

138. The NLRB often disagrees with the federal courts. The Supreme Court in *Belknap* only suggested the offering of conditionally permanent employment to replacements, and it is uncertain whether the Board would find the conditional offers sufficient to establish that the replacements were permanent. This is particularly true in light of the NLRB's position as amicus curiae in *Belknap*.

139. Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976); Local 20, Teamsters v. Morton, 377 U.S. 252 (1964).

140. Belknap, Inc. v. Hale, 463 U.S. 491, 516 (1983) (Blackmun, J., concurring).

different from its meaning in the ordinary context,[141] but this difference is necessary because any obligation to the replacements utterly destroys the weapon that employers have been given by Congress under the NLRA. In *Mooremack Gulf Lines, Inc.*[142] the NLRB specifically noted that the employer was not bound to discharge the replacements it had promised permanent employment, but it could *choose* to retain the replacements.[143] The Office of the General Counsel for the NLRB has asserted that if state actions for breach of contract and misrepresentation brought by discharged permanent replacements were allowed, the employer's license to offer employment to replacements would be defeated. Permanent replacements, according to the General Counsel, bear the risk of being laid off or discharged.[144] The General Counsel's view merits deference, since Congress created the Board as a special administrative agency specifically designed to deal with labor disputes based on its expertise in the special interests involved in the industrial labor field.[145]

### C. *Analysis Under the Primary Jurisdiction Rationale*

Belknap also contended that because Belknap's grant of a unilateral wage increase on the day the strike began was arguably prohibited by section 8 of the NLRA,[146] preemption of the state court actions was required under the primary jurisdiction rationale.[147] The Court rejected this argument and reaffirmed the *Sears* critical inquiry test used in arguably prohibited cases.[148] In applying this test, the *Belknap* Court found that the controversy presented to the state court was not identical to the controversy which could have been presented to the NLRB. Therefore, preemption was not required. The Court also noted that the state had a substantial interest in permitting the state actions of the replacement workers, while the actions were of only peripheral concern to the NLRA.[149] Thus, even if preemption were proper, the case fell within an exception to the rule. The Court unanimously agreed that the arguably prohibited branch of the primary jurisdiction rationale did not warrant preemption in *Belknap*. Justice Brennan appears to have accepted the "critical inquiry" test that he had rejected in *Sears*.[150]

The Court, however, failed to view the dispute in its entirety. Instead, it bifurcated the controversy into two disjoint sets: (1) the controversy between the strikers and Belknap, and (2) the relationship between the employer and the replacement workers. In a preemption case, the conduct being regulated is the proper focal

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141. *Id.* at 541–42 (Brennan, J., dissenting).

142. 28 N.L.R.B. 869 (1941).

143. *Id.* at 881.

144. Higgins, *Overview of the Office of General Counsel*, 1983 LAB. L. DEVELOPMENTS 151, 163–64.

145. *See, e.g.*, Amalgamated Ass'n of St., Elec., Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 288–91 (1971); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

146. Brief for Petitioner at 16–17, Belknap, Inc. v. Hale, 463 U.S. 491 (1983).

147. *See, e.g.*, San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

148. Belknap, Inc. v. Hale, 463 U.S. 491, 510 (1983); *see* Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978).

149. Belknap, Inc. v. Hale, 463 U.S. 491, 511 (1983).

150. *Id.* at 534 (Brennan, J., dissenting). According to Brennan, "careful analysis" yields that while the conduct was arguably prohibited, the state action cannot be preempted under this theory. He refrained, however, from explaining his analysis.

point.[151] In *Belknap* the regulated conduct was the discharge, for the purpose of reinstating economic strikers, of replacements promised permanent employment. Thus, the three parties are interrelated and cannot be treated distinctly. Even under the *Sears* critical inquiry approach, the controversy before the NLRB would have been whether the replacements were wrongly discharged, and this is the exact controversy which faced the Kentucky state courts.

The *Belknap* Court expressed concern that the replacements would be denied a remedy unless they had access to the state courts, since in the Court's view the replacements could not bring their complaint before the NLRB.[152] Preemption, however, often deprives someone of a right he or she would otherwise have the power to assert. This sacrifice is necessary to advance a greater social interest. The uniform application of federal labor laws and the encouragement of peaceful settlement of labor disputes are vital to the national administration of labor-management relations. While it might seem undesirable to prefer a public interest over conflicting private rights, it is often necessary and is implicit in the nature of preemption.

## V. Problems Raised by *Belknap* and a Potential Solution

Two major issues require consideration as a result of the Court's decision in *Belknap, Inc. v. Hale*. First, the rights of replacements and the effect of these rights on the balance of economic weapons available to strikers and employers must be determined. Second, a workable rule of preemption must be developed.

### A. *The Effect of* Belknap *on the Rights of Employers, Strikers, and Replacements*

#### 1. *The Employer's Decision to Hire Replacement Workers*

After *Belknap*, to insulate the company from liability to replacement workers, employers must reconsider their positions before hiring replacements to carry on business operations in the midst of a strike. An employer is bound to reinstate economic strikers if they unconditionally offer to return to work, but the duty to reinstate is abrogated if the employer can prove it hired permanent replacements.[153] *Belknap* holds that an employer may be liable to the permanent replacements for state court damage actions if the employer chooses to discharge the replacements and reinstate the strikers.[154]

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151. Amalgamated Ass'n of St., Elec., Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 292 (1971).

152. Belknap, Inc. v. Hale, 463 U.S. 491, 510 (1983).

153. It is often disputed whether an employer has, in fact, hired "permanent" replacements. *See* Int'l Ass'n of Machinists, District No. 8 v. J.L. Clark Co., 471 F.2d 694, 698 (7th Cir. 1972), in which the Court held that employers cannot abuse the right to hire permanent replacements by using pretextual permanent replacements; *accord* Lodge 743 and 1746, Int'l Ass'n of Machinists v. United Aircraft Corp., 534 F.2d 433, 449 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976).

154. *See* Illinois v. Federal Tool and Plastics, 62 Ill. 2d 549, 344 N.E.2d 1 (1975), in which the Supreme Court of Illinois preempted an Illinois state statute that imposed criminal sanctions on employers who failed to give notice of strikes in progress when advertising for replacement workers. The court reasoned that the law encumbered the employer's right to hire permanent replacements and impaired the balance struck by Congress in the NLRA.

The *Belknap* Court suggests that an employer condition permanent offers of employment to the replacements, and asserts that this would insulate the employer from liability to the replacements and still provide the employer with an effective weapon to be used against striking employees during settlement negotiations.[155] Four Justices disagreed with the Court's assertion that conditional offers satisfy the permanence requirement necessary for the employer to refuse reinstatement of economic strikers at their demand. In fact, the amount and nature of the conditions associated with the conditional offer that will convince a court that the permanence requirement is satisfied remains uncertain.

Because the effect of a conditional offer is uncertain employers likely will be unwilling to make such offers, since if replacements offered conditional employment are found not to be permanent employees, the employer then has no bargaining leverage in union negotiations. If the strikers demand their jobs back, the employer will be bound to reinstate the strikers upon their unconditional offer to return to work.[156] An employer who is unable to threaten strikers with foreclosure from their jobs will be unarmed during negotiations with the striking union.[157] In *Belknap* Justice Blackmun even argued that an employer who hired conditionally permanent replacements would commit an unfair labor practice if, during the strike, the employer threatened the strikers that they would not be reinstated.[158]

An employer could choose to hire replacements who are clearly temporary, but this strips the employer of bargaining leverage since hiring temporary replacements is not sufficient to abrogate an employer's duty to reinstate economic strikers if they unconditionally offer to return to work.[159] Of course, the employer could choose not to hire replacement workers at all, but the employer would remain powerless during negotiations with the union and, additionally, would be unable to carry on its operations.

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155. Belknap, Inc. v. Hale, 463 U.S. 491, 503–04, 503 n.8 (1983).

156. *See, e.g.*, NLRB v. Mars Sales & Equip. Co., 626 F.2d 567, 572 (7th Cir. 1980); NLRB v. Murray Prods., Inc., 584 F.2d 934, 938 (9th Cir. 1978).

157. Some commentators argue that the only justification for allowing an employer to hire permanent replacements is to permit it to carry on its business during a strike, and that the permanent offer is necessary to induce workers to enter the employment relationship. This view ignores that hiring permanent replacements is an employer's weapon to force union concessions during negotiations. Without the threat of possibly losing their jobs, employees could strike and return to work at their whims, and employers could not combat this practice. It would be a one-sided battle and the union could continue assaulting the employer, thereby testing its economic strength. If the employer could withstand this attack, the employees would lose nothing; they are entitled to return to work. Thus, the hiring of permanent replacements is also a necessary employer weapon to balance the economic forces between unions and employers. *See* Schatzki, *Some Observations and Suggestions Concerning a Misnomer—"Protected" Concerted Activities*, 47 TEX. L. REV. 378, 382 (1969); Comment, *The Illusion of Permanency for* Mackay *Doctrine Replacement Workers*, 54 TEX. L. REV. 126 (1975); Comment, *The* Mackay *Doctrine and the Myth of Business Necessity*, 50 TEX. L. REV. 782 (1972); Comment, *Replacement Workers During Strikes*, 75 YALE L.J. 630 (1966). These articles suggest that temporary employees should be used during all strikes. This view is consistent with the justification that replacements are hired solely to carry on the employer's business during a strike, and does not interfere with the employee's right to strike. *Contra* Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195 (1967) (The author recognizes that although the purpose of replacements is to allow employers to carry on their businesses, the replacements may also serve other employer interests, *e.g.*, the replacements may not be union adherents. While this may impose risk on strike activity, the current rule is as good as any other since there is no way to read the minds of employers.).

158. Belknap, Inc. v. Hale, 463 U.S. 491, 516 (1983) (Blackmun, J., concurring).

159. NLRB v. Murray Prods., Inc., 584 F.2d 934 (9th Cir. 1978).

The *Belknap* Court did not deny that employers may hire permanent replacements for striking employees,[160] but held that the replacements promised permanent employment may sue for breach of contract and misrepresentation in state court if they are discharged to make room for returning strikers. Since any offer to replacements, other than a permanent offer, may effectively strip an employer of bargaining leverage, any employer insistent upon its bargaining demands[161] will hire permanent replacements. After *Belknap*, an employer has little incentive to agree to the reinstatement of striking employees. It will hire permanent replacements for economic strikers in order to increase its bargaining strength. The employer must continue to bargain with the striking union if negotiations are reestablished, but the employer is not obligated to agree to any substantive term, including the reinstatement of the strikers. It is unlikely that an employer will ever be willing to reinstate strikers, except as jobs become available, since if an employer discharges the permanent replacements it may be liable to them for damages. Because union employees fear loss of their jobs, they will hesitate before striking. The discouragement of economic strikes is undesirable in view of Congress' intention that employers and employees have available to them economic warfare in the event peaceful negotiations fail. The real danger resulting from *Belknap*, then, is the enhancement of employers' power.[162]

The hiring of replacement workers may permit an employer to circumvent dealing with the striking union altogether. If there is reason to believe that the union no longer represents a majority of the employees,[163] a petition for an election to decertify the union as the bargaining representative of the employees may be filed.[164] The replacement workers have the right to vote in any election.[165] If the election is held within twelve months after the commencement of the economic strike, the strikers also have the right to vote.[166] If the election is held twelve months after the commencement of the strike, however, the striking employees may not vote in the decertification election.[167]

Predicting the results of a decertification vote becomes easy. It is unlikely that replacement workers would support the union, given the competing interests of the union and the replacements during the strike. The union must bargain to reinstate the

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160. Belknap, Inc. v. Hale, 463 U.S. 491, 500 (1983). In fact, *Belknap* has recently been cited for the proposition that the right to hire permanent replacements is one of the employer's primary weapons during an economic strike. Vulcan Hart Corp. v. NLRB, 718 F.2d 269, 274 (8th Cir. 1983).

161. It is likely that the employer will be insistent on its bargaining demands since the strike is called after an impasse in negotiations has been reached, and the parties are deadlocked in disagreement. The very purpose of economic warfare is to pressure the weaker party into departing from its bargaining demands.

162. *See supra* note 137.

163. Since the replacements may make up a bulk of the unit, it may be reasonable to infer that the union no longer represents a majority. The interests of the replacements conflict with those of the union, which also represents the strikers, and it follows that the replacements are not likely to want the union as their bargaining representative.

164. National Labor Relations Act § 9(c)(1)(A), 29 U.S.C. § 159(c)(1)(A) (1982).

165. American Chem. Corp., 215 N.L.R.B. 94 (1974); Pacific Tile & Porcelain Co., 137 N.L.R.B. 1358 (1962).

166. National Labor Relations Act § 9(c)(3), 29 U.S.C. § 159(c)(3) (1982). Strikers have the right to vote in elections held within twelve months after the strike began, whether the strikers are actively on strike or whether they are on a preferential reinstatement list as a result of an economic strike. Bio-Science Laboratories v. NLRB, 542 F.2d 505 (9th Cir. 1976).

167. National Labor Relations Act § 9(c)(3), 29 U.S.C. § 159(c)(3) (1982). This is true whether the election is a certification or a decertification election. Wahl Clipper Corp., 195 N.L.R.B. 634 (1972).

strikers, but by doing so it implicitly supports ousting the replacements from their jobs. Therefore, the union will likely be defeated in a decertification election within the twelve month period, and defeat is almost certain if the election is held after the twelve month period expires, since the economic strikers who have not been reinstated by the employer lose their rights to vote.[168] The result in each situation depends on the number of replacements hired and the number of strikers voting. The *Belknap* Court appears to have overlooked this effect on unionization and collective bargaining in its haste to provide a remedy for the discharged replacement workers.

An employer faces different problems if the strike is adjudicated an unfair labor practice strike. In that case the employer must reinstate strikers, even if permanent replacements have been hired.[169] The *Belknap* majority opinion suggests that employers will also be liable, for breach of contract and misrepresentation, to replacement workers promised permanent employment if the replacements are discharged to make room for the unfair labor practice strikers.[170] The employer, of course, may agree to retain the replacements and reinstate the strikers, but the employer then faces the anomaly of maintaining a double workforce. Since it often cannot be determined whether a strike is economic or unfair labor practice in nature, an employer faced with the possibility of liability to replacements will be hesitant to offer permanent employment, and the employer's economic weapon of hiring permanent replacements is hindered.

The dissenters in *Belknap* were concerned with the possibility that a strike would be adjudicated an unfair labor practice strike.[171] They suggested that an employer should not bear the risk of whether the strike is determined to be an economic or an unfair labor practice strike, and would not hold the employer liable to the replacements promised permanent employment in either an unfair labor practice or an economic strike case. This leaves the employer free to exercise its self-help weapon of hiring permanent replacements.

### 2. *Analysis of Alternative Remedies for Replacement Workers*

The replacement employee's status under the NLRA remains a mystery. The replacements are employees as defined in section 2(3) of the NLRA,[172] and thus, are

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168. In Vulcan Hart Corp. v. NLRB, 718 F.2d 269 (8th Cir. 1983), the employer hired 24 permanent replacements for its striking employees. Four strikers returned to work and 33 employees remained on strike. The employer in *Vulcan Hart* caused a decertification petition to be filed and withdrew recognition from the union. The court found this to be an unfair labor practice since the employer could not show an actual lack of majority support or a reasonable good-faith doubt of the union's majority. Even assuming the 24 replacements and the 4 returning strikers did not support the union, they alone did not outnumber the strikers. The reasonableness of whether enough strikers were dissatisfied with the union to swing the majority of workers into the category of dissaffection with the union was a question of fact, which the NLRB resolved in the union's favor.

169. Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956); Philip Carey Mfg. Co. v. NLRB, 331 F.2d 720 (6th Cir.), *cert. denied*, 379 U.S. 888 (1964); NLRB v. Efco Mfg., Inc., 227 F.2d 675 (1st Cir. 1955), *cert. denied*, 350 U.S. 1007 (1956).

170. Belknap, Inc. v. Hale, 463 U.S. 491, 508 n.12, 512 (1983).

171. *Id.* at 528, 542 (Brennan, J., dissenting).

172. *See supra* note 94. The NLRA as originally proposed denied strike replacements employee status. 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935 at 2 (1949). Today, the replacements are accorded the NLRA status of employees. *See also In re* Mooremack Gulf Lines, Inc., 28 N.L.R.B. 869 (1941).

guaranteed the section 7 statutory rights of self-organization; forming, joining, or assisting labor organizations; and engaging in concerted activities for the purpose of collective bargaining. Section 7 also guarantees the replacements the right to refrain from all section 7 activities.[173] While the replacements may refrain from joining the union that represents the bargaining unit into which the replacements are hired, the replacements are considered members of the certified bargaining unit. By virtue of the replacements' status as members of the bargaining unit, the union representing the unit becomes the exclusive representative of the replacements, even though they are not union members.[174] The employer is bound to bargain exclusively with the union as the sole representative of the unit, to avoid committing an unfair labor practice.[175]

The employer, however, cannot discriminate against the replacement employees in regard to tenure of employment and cannot encourage or discourage membership in any labor organization.[176] Discharged permanent replacements could therefore argue that the employer has committed an unfair labor practice by discharging them from their jobs for the purpose of reinstating the strikers,[177] since the discharges resulted solely from the replacements' lack of union membership. The replacements would have access to NLRB jurisdiction, but the outcome of this litigation is uncertain. The employer's defense would be that the NLRA obligates the employer to bargain exclusively with the union as the sole representative of the employees, and the employer has done nothing more than fulfill its statutory duty.

The replacements could bring an action against the union for a breach of its duty of fair representation.[178] The union would counter that it had a reasonable basis—seniority—for preferring the strikers' reinstatement rights over the rights of the replacement workers. However, a court will not allow the union to successfully advance a pretextual justification if it actually had an improper motive behind its preference.[179] A state court action brought by replacement workers against a union for breach of its duty of fair representation might be preempted by federal labor policy, since holding a union liable to permanent replacements when the union must also negotiate with the employer and urge reinstatement of the striking employees would destroy the employees' strike weapon; a union would be hesitant to urge reinstatement of striking employees if it would be held liable in state court to permanent replacements. Since reinstatement would be uncertain, union members would fear the possible loss of their jobs, and the use of economic strikes would be discouraged.

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173. *See supra* note 23.

174. *In re* Louis Natt, 44 N.L.R.B. 1099 (1942).

175. *See supra* note 106.

176. Discrimination violates § 8(a)(3) of the NLRA. *See supra* note 106.

177. *See* Comment, *supra* note 157, at 133–34.

178. *See* Vaca v. Sipes, 386 U.S. 171 (1967) (breach of duty of fair representation occurs when union's conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith); *see also* Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

179. *See* Comment, *The Illusion of Permanency for* Mackay *Replacement Workers*, 54 TEX. L. REV. 126, 145 (1975).

### 3. *A Proposed Solution*

The *Belknap* Court's decision presents many complex problems in the interrelationship between employers, striking employees, and replacement workers. Inherent conflicts between all the parties to a labor dispute are present in the federal scheme enacted by Congress. An employer should not be forced to gamble on whether a strike by its employees is an unfair labor practice or an economic strike to effectively exercise its ability to hire permanent replacements. A "good" gamble by an employer who decides to hire permanent replacements that the strike is an economic dispute destroys the interests of the union. After *Belknap*, a "bad" gamble by the employer who decides to hire permanent replacements that the strike is economic, when it is later determined to be an unfair labor practice strike, unduly burdens an employer's interest. The replacements' interests are a concern, too, and it seems unfair to promise them permanent employment and later discharge them to reinstate strikers. Past decisions have suggested that the replacements' interests must yield to the national interests in the promotion of collective bargaining to achieve industrial peace.[180] A compromise, however, could be reached that would still absolve employers from liability for state court breach of contract and misrepresentation lawsuits to replacements who were promised unconditional permanent employment. If the reinstatement of economic strikers is agreed upon, or if the strike is adjudicated to be an unfair labor practice strike and the employer is ordered to reinstate the striking employees, the strikers should be reinstated. The "permanent" replacements, in turn, should be either (1) retained by the employer or (2) given the employment status that economic strikers presently enjoy when they have been permanently replaced[181]—retention of employment status with the employer, receipt of all incidental fringe benefits, and the right to be recalled to work when opportunities become available until the replacements find substantially equivalent employment.[182] This solution affords the replacements some protection and maintains the balance of power created by Congress in the NLRA.

## B. *Further Preemption Problems*

### 1. *Primary Jurisdiction Rationale*

*Belknap, Inc. v. Hale* casts further shadows on the development of a clear and predictable preemption doctrine. The *Belknap* Court confirmed that two distinct theories of preemption exist: the primary jurisdiction rationale and the substantive rights rationale. The arguably protected, the arguably prohibited, and the permitted activity branches of the preemption doctrine, however, present problems after *Belknap*.

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180. *See supra* note 50 and text accompanying note 129.

181. *See* Laidlaw Corp. v. NLRB, 414 F.2d 99, 105 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970); *accord* H & F Binch Co. v. NLRB, 456 F.2d 357, 364 (2d Cir. 1972); NLRB v. Johnson Sheet Metal, Inc., 442 F.2d 1056, 1061 (10th Cir. 1971).

182. *See supra* text accompanying note 94.

The life of the arguably protected branch of the primary jurisdiction rationale remains threatened. The Court may have held that the state actions in *Belknap* should not be preempted because of its opinion that since the replacements had no access to the NLRB, preemption of the replacements' state actions would leave the workers without a forum to determine whether the company's conduct was, in fact, actually protected. This has been a recurring criticism of the arguably protected branch of the preemption doctrine. The problems resulting from the *Belknap* decision add momentum to this criticism. While the replacements would not have a forum to decide whether the conduct was actually protected, the preemption of a few cases involving conduct which is arguably, but in reality not actually, protected by the NLRA is the necessary price paid for the advancement of a uniform national labor policy.

The Justices apparently unanimously adopted the critical inquiry test that was formulated in *Sears* for conduct arguably prohibited by the NLRA.[183] The problem with the critical inquiry test is that, in most cases, an action brought before a state court may be easily distinguished from an action brought before the NLRB.[184] This distinction is most easily made by ignoring the mandate of *Garmon* and *Lockridge* that the focus of the inquiry be on the conduct being regulated and not on the governing legal standards defining the conduct.[185]

By loosening the arguably protected and arguably prohibited branches of the preemption doctrine, the Court has departed from a broad application of preemption and has granted the states greater power to regulate labor-management disputes. Uniformity in the application of the federal labor laws has been sacrificed and will continue to suffer since conduct is often not clearly protected nor prohibited by the NLRA. Few activities can be catalogued actually protected or actually prohibited by the NLRA rather than arguably protected or arguably prohibited. Fitting the conduct into an "arguably" category provides those seeking state regulation a greater chance to gain relief in state court.

### 2. *Substantive Rights Rationale*

The *Belknap* decision supports the test formulated in *Machinists* that whether Congress intended conduct to be left unregulated may be determined by examining whether the operation of state law would frustrate the policies of federal labor law. The problem in *Belknap* lies with the Court's application of the rule. The Court, in its short-sighted attempt to redress appealing grievances, did not weigh the policies behind the NLRA heavily enough.

Perhaps the Court will soon be presented with a case in which it can remedy the problems which permeate the preemption doctrine. The return to a broader preemption doctrine to guarantee the uniform application of federal labor laws and to advance the federal labor policy of encouraging collective bargaining for the purpose of

183. Belknap, Inc. v. Hale, 463 U.S. 491, 510 (1983). Justice Brennan, who rejected the test in *Sears*, accepts the test in his *Belknap* dissent. *Id.* at 534 n.8 (Brennan, J., dissenting).

184. *See* Brody, *supra* note 15, at 218–20.

185. *See supra* text accompanying note 35.

reducing industrial strife is imperative. Balancing tests for preemption cases have been suggested,[186] but the balancing tests lack predictability in results and are open to the subjective determinations of various judges who may view differently a given activity's effect on labor-management interests. Balancing does suggest, however, that the effect of state regulation on an activity is the real concern in preemption cases,[187] and the Court must not get involved in providing short term results at the cost of sacrificing a uniform national labor policy. The Court should adopt a presumption that state laws which conflict with labor-management interests are preempted unless the law can be fit into an exception.

## VI. CONCLUSION

The Court in *Belknap, Inc. v. Hale* ignored established preemption principles by holding that state court breach of contract and misrepresentation actions against an employer brought by discharged replacement employees, who were promised permanent employment and hired to fill jobs of striking employees, are not preempted by federal labor law. Its decision defeats the policies of the NLRA. Exposure to state liability destroys the employer's economic weapon of hiring permanent replacements, yet enhances an employer's economic power in certain situations. Employees will now fear the results of an economic strike, and the use of economic strikes may be chilled. A better solution to the plight of replacement workers would be to allow employers to hire permanent replacements for economic strikers, and to discharge the replacements if strike settlement or a Board or court order calls for reinstatement of the striking employees. The interests of the discharged replacement workers should be protected by allowing these workers to retain their employment status with the employer, receive all incidental rights and privileges normally accorded an employee, and be entitled to reinstatement as jobs become available.

The *Belknap* Court also added to the confusion surrounding the application of the preemption doctrine. The Court needs to clarify and broaden the scope of the preemption doctrine to encourage the uniform application of the NLRA and the use of collective bargaining to achieve industrial peace.

*Janet L. Braun*

186. *See* Cox, *supra* note 15. Cox suggests that state laws of general applicability be allowed to operate in labor-management controversies unless the application of the law is based on an accommodation of special interests of employers, unions, employees, or the public in employee self-organization collective bargaining or labor disputes which will upset the balance struck by Congress in the NLRA. *Id.* at 1355–56. Cox reaffirmed this position in Cox, *supra* note 50, at 281; *see also* Comment, *Balancing in Labor Law Preemption Cases*: New York Tel. Co. v. New York State Dep't of Labor, 32 STAN. L. REV. 827 (1980).

187. *See* Cox, *supra* note 50, at 295–96. Cox asserts that in enacting the NLRA, Congress was not concerned with everything affecting labor-management relations or the balance of power in collective bargaining. He intimates, though, that laws having a direct effect on bargaining power should be preempted.